

Before the  
FEDERAL COMMUNICATIONS COMMISSION  
Washington, DC 20554

In the Matter of: )  
 ) ET Docket No. 04-35  
New Part 4 of the Commission's Rules )  
Concerning Disruptions to Communications )

**QWEST CORPORATION AND QWEST COMMUNICATIONS CORPORATION  
PETITION FOR PARTIAL STAY**

**I. INTRODUCTION AND SUMMARY**

Qwest Corporation (local exchange carrier) and Qwest Communications Corporation (interexchange carrier) (collectively “Qwest”) request the Federal Communications Commission (“Commission”) to stay the implementation date of its new rule 47 C.F.R. § 4.9<sup>1</sup> insofar as the rule would compel reporting of DS3 simplex “switch-to-protect” events. The stay should extend through the conclusion of the reconsideration portion of the instant proceeding.

The DS3 service outage reporting regime adopted by the Commission does not advance its stated concerns and objectives when extended to DS3 simplex reporting of switch-to-protect events. The Commission sought to craft DS3 service outage rules that would allow monitoring of “a communications highway” carrying digital traffic that it considered part of this nation’s “communications infrastructure.”<sup>2</sup> Through such monitoring it believed it could assess those circumstances when that highway was unavailable for critical telecommunications functions.<sup>3</sup>

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<sup>1</sup> *In the Matter of New Part 4 of the Commission's Rules Concerning Disruptions to Communications, Report and Order and Further Notice of Proposed Rule Making*, 19 FCC Rcd 16830, 16925-28 (“*Service Outage Order*”).

<sup>2</sup> *Id.* at 16836 ¶ 8.

<sup>3</sup> *Id.* at 16855 ¶ 45.

While the goal is laudable, a requirement that carriers report DS3 simplex switch-to-protect events is not aligned with the regulatory objective and is not based on reasoned decisionmaking.

The public interest will not be harmed by a limited stay since there is no simplex reporting obligation at this time. The reconsideration process will provide commenting parties the opportunity to put on the record evidence regarding the costs and burdens of such a reporting requirement. That evidence can then be weighed against any putative public interest benefit.

Qwest is of the opinion that the evidence developed during the reconsideration process will demonstrate that DS3 simplex reporting is too burdensome not only to carriers but to the Commission itself to be sustained. Qwest expects the evidence to show that the simplex reporting obligation does not advance the Commission's overall objective regarding DS3 reporting and that there is no correlative benefit to the public in retaining the reporting requirement. Qwest is confident that, at the conclusion of the reconsideration process, the Commission will modify the simplex reporting requirement such that it becomes better aligned with the Commission's objective to be informed of events that actually represent material degradations of service or network performance, *i.e.*, outages.

## II. ANY MANDATE THAT CARRIERS REPORT DS3 SIMPLEX EVENTS SHOULD BE STAYED PENDING RECONSIDERATION

### A. There Was Inadequate Notice Of Any Contemplated DS3 Simplex Reporting Obligation

A limited stay of the simplex reporting aspect of the DS3 reporting requirements is warranted given that the *Service Outage NPRM*<sup>4</sup> lacked adequate notice under the Administrative

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<sup>4</sup> *In the Matter of New Part 4 of the Commission's Rules Concerning Disruptions to Communications, Notice of Proposed Rulemaking*, 19 FCC Rcd 3373 (2004) ("*Service Outage NPRM*").

Procedure Act (“APA”)<sup>5</sup> that the Commission might construe a switch-to-protect event as an “outage.” The surprise to carriers associated with the Commission’s *Service Outage Order*’s establishment of a DS3 simplex reporting obligation is particularly obvious when one considers that the facts of a DS3 simplex event are at odds with the definition of “outage” proposed in the *Service Outage NPRM*, a definition ultimately adopted by the Commission.<sup>6</sup> Specifically an “outage” is “a significant degradation in the ability of an end user to establish and maintain a channel of communications as a result of failure or degradation in the performance of a communications provider’s network.”<sup>7</sup> Neither aspect of this definition is evident in a DS3 simplex event. Indeed, a DS3 switch-to-protect event operates exactly as it is designed to in the carrier’s network; and, in the vast majority of cases, operates to avoid any substantial degradation of an end user’s services.<sup>8</sup>

As a result of the inadequate notice regarding any potential DS3 simplex reporting obligation, commenting parties did not comment on simplex reporting in response to the *Service Outage NPRM*. The reporting obligation was articulated for the first time in the *Service Outage Order* when anecdotal evidence was cited in support of the requirement; and a single switch-to-protect event that did result in a service outage was mentioned.<sup>9</sup> This is not the type of empirical

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<sup>5</sup> See 5 U.S.C. § 553(b).

<sup>6</sup> See definition of outage in final rules, as adopted, for Part 4, § 4.5(a), in *Service Outage Order*, 19 FCC Rcd at 16923 (App. B).

<sup>7</sup> *Id.*, 19 FCC Rcd at 16923 § 4.5.

<sup>8</sup> See *Petition for Partial Stay*, filed herein by United States Telecom Association (“USTA”) on Nov. 19, 2004, at 8 and its reference (footnote 27) to the International Engineering Consortium on-line tutorial regarding SONET rings, <http://www.iec.org/online/tutorials/sonet/index.html> at 6 making this clear (“USTA *Petition for Partial Stay*” or “USTA *Petition*”).

<sup>9</sup> *Service Outage Order*, 19 FCC Rcd at 16898-99 ¶ 134 (referencing communications with the Commission regarding an unspecified “number of network outages . . . where there [were] multiple failures on a SONET ring at different points in time” and “one case” where the DS3 apparently failed “five months after the initial failure”).

“evidence” or filed commentary that should form the basis of Commission rules, particularly rules that impose substantial and costly regulatory requirements on the wireline telecommunications industry.

The existing record lacks information about the costs to carriers to implement a simplex reporting regime and the benefit to the public in adopting such a reporting requirement. During the reconsideration phase of the current proceeding, the Commission will undoubtedly be provided with material evidence on the burdens associated with a carrier obligation to report DS3 simplex switch-to-protect events. A limited stay should be granted to allow for the production of that evidence unencumbered by an already imposed federal regulatory burden.

B. Qwest’s Petition Meets The Requirements  
For A Grant Of A Partial Stay

A stay of the obligation to file DS3 simplex switch-to-protect reports is warranted since carriers are likely to be successful on the merits in terms of convincing the Commission to reverse the substance and scope of the existing obligation on reconsideration. Moreover, requiring carriers to implement this burdensome simplex reporting regime by January 2005 would cause carriers irreparable injury. On the other hand, no third parties will be harmed and the public interest will be served by granting a partial stay along the lines requested by Qwest.<sup>10</sup>

1. The Simplex Reporting Obligation Will Most Likely Be Modified  
On Reconsideration And Carriers Will Be Successful On The Merits

The burdens associated with reporting DS3 simplex switch-to-protect events are substantial not only to carriers but for the Commission as well. The evidence recently put on the

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<sup>10</sup> The likelihood of success on the merits, irreparable injury, lack of harm to third parties and a benefit to the public interest are elements for the grant of a stay. *See Virginia Petroleum Jobbers Ass’n v. FPC*, 259 F.2d 921, 925 (D.C. Cir. 1958) (“*Virginia Jobbers*”).

record in association with the USTA *Petition for Partial Stay*<sup>11</sup> demonstrates the extent to which the Commission's mandate is at odds with the Commission's own expectations regarding the total burden associated with its new service outage regime. The Commission estimated that "the total number of reports, from all reporting sources combined, will be substantially less than 1,000 annually."<sup>12</sup> Yet the USTA *Petition* demonstrates the extent to which the Commission's expectations deviate from reality in terms of report volumes.

In the USTA *Petition* at least three Regional Bell Operating Companies each have declared that they would estimate filing 1,000 or more reports for DS3 simplex reporting alone!<sup>13</sup> Qwest estimates that its local exchange carrier would file approximately 804 reports and its interexchange carrier 1,606 reports.<sup>14</sup> This means that – as to Qwest – the Commission's anticipated reporting burden is off by more than 100%.

Clearly the reporting burdens associated with simplex reporting are materially at odds with the Commission's expectations. For this reason, they should not be imposed (*i.e.*, should be stayed) during the pendency of the reconsideration process. The Commission should utilize the reconsideration process to allow for a more fully-developed record on the matter of simplex reporting so that it can either substantially revise its estimate of the total reporting burden associated with the new service outage reporting regime or it can modify its reporting regime to more align itself with the production of 1,000 reports annually.

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<sup>11</sup> See USTA *Petition for Partial Stay* and Affidavits, Declaration attached thereto.

<sup>12</sup> *Service Outage Order*, 19 FCC Rcd at 16946-47, Appendix D (Final Regulatory Flexibility Analysis) ¶ 28.

<sup>13</sup> See USTA *Petition for Partial Stay* at 10-13 (*e.g.*, BellSouth anticipates 1,011 simplex reports per year with an estimated cost of \$5.82M, and of those events, only 0.3% to 0.4% would result in customer-affecting outages; Verizon estimates a reporting volume of 1,000 reports with an annual cost of \$5.5M; SBC anticipates having to file 3,500 reports with each report requiring an average of 90 management man-hours).

2. Carriers, Including Qwest, Will Suffer Irreparable Injury If  
The DS3 Simplex, Switch-To-Protect Events Are Not Removed  
From The Initial Implementation Of The Service Reporting Rules  
And The Balance Of Equities Supports The Partial Stay

Wireline carriers across the country, large and small, incumbent and new entrants, will suffer irreparable injury if the Commission requires ubiquitous DS3 simplex reporting on an unqualified basis beginning January of 2005 or thereabouts, in advance of the development of a full record. Carriers will of necessity be forced to expend monetary and human resources as they strive to meet the reporting requirements associated with simplex reporting.

While economic injury is sometimes argued as an insufficient basis on which to find “irreparable injury,” such is not automatically excluded, particularly when the monetary losses cannot be recouped in the future through an adequate compensatory scheme.<sup>15</sup> The Commission might find it not unreasonable, during the reconsideration process, to require carriers to absorb the economic burden (*i.e.*, costs) associated with implementing a reporting regime that could result in an additional 1,000 reports **in total across the industry** (not an insubstantial number in itself). However, the fact that the Commission’s estimates are so understated that the number of reports required for DS3 simplex reporting alone exceeds what the Commission previously assumed as the totality of the reporting burden for carriers demonstrates the significant scope of the economic injury carriers will really have to bear should they be obligated to report simplex events as if they were outages. Those losses will not be able to be recouped should the Commission change its decision regarding simplex reporting.

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<sup>14</sup> Declaration of Dennis Pappas, Attachment A, appended hereto at ¶ 4.

<sup>15</sup> See *Virginia Jobbers*, 259 F.2d at 925. And see *Washington Metro. Area Transit Comm’n v. Holiday Tours, Inc.*, 559 F.2d 841, 843 n.2 (D.C. Cir. 1977) (“*Washington Metro.*”); *Sampson v. Murray*, 415 U.S. 61, 90 and n.64, 94 S. Ct. 937, 39 L. Ed.2d 166 (1974) (citing to *Virginia Jobbers*).

In a DS3 simplex switch-to-protect environment, not only has no outage legally occurred (considering the Commission's definition) but carriers' operations support systems ("OSSs") are not designed to capture information about such events as if they were outages. As the Commission is aware, changes to OSSs generally require vendor support. That support must be preceded by fabrication.<sup>16</sup> None of that has occurred at this point.

Moreover, nothing in the existing record evidences significant benefits to the public from simplex reporting such that those benefits could be said to outweigh what are generally quite significant costs anytime changes are made to OSSs. The Commission should secure such evidence during the reconsideration portion of this proceeding before imposing such a simplex reporting obligation.

Finally, a stay is warranted where there may be no absolute showing of irreparable injury if an applicant demonstrates a high probability of success on the merits,<sup>17</sup> the issuance of the stay would not substantially harm others and the public interest is not compromised – a sort of balancing of the equities within the context of the facts at hand.<sup>18</sup> Such is the case here. The

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<sup>16</sup> See, e.g., *In the Matter of Telephone Number Portability, CTIA Petitions for Declaratory Ruling on Wireline-Wireless Porting Issues, Memorandum Opinion and Order and Further Notice of Proposed Rulemaking*, 18 FCC Rcd 23697, 23714 ¶ 42 (2003); *In the Matter of Provision of Directory Listing Information Under the Communications Act of 1934, As Amended, Notice of Proposed Rulemaking*, 17 FCC Rcd 1164, 1175-79 ¶¶ 22-29 (2002); *In the Matter of Amendment of Part 11 of the Commission's Rules Regarding the Emergency Alert System, Notice of Proposed Rulemaking*, 16 FCC Rcd 7255, 7258-59 ¶¶ 10-11 (2001); *In the Matter of: Communications Assistance for Law Enforcement Act, Further Notice of Proposed Rulemaking*, 13 FCC Rcd 22632, 22648 ¶ 30 (1998).

<sup>17</sup> See *Virginia Jobbers*, 259 F.2d at 925 (an "injury held insufficient to justify a stay in one case may well be sufficient to justify it in another, where the applicant has demonstrated a higher probability of success on the merits[']").

<sup>18</sup> See *Washington Metro.*, 559 F.2d at 843-44 (acknowledging a standard governed by the "balance of equities" when an applicant's chance of success on the merits might be questionable, but noting that such a balanced approach might properly result in "[a]n order maintaining the status quo . . . when a serious legal question is presented, when little if any harm will befall other interested persons or the public and when denial of the order would inflict irreparable injury on

equities of the instant situation are all with the carriers who were surprised by the DS3 simplex, switch-to-protect obligation in the first place and that will be unfairly burdened by its implementation.

3. Third Parties Will Not Be Harmed By Granting A Partial Stay

The extension of DS3 reporting into the area of simplex switch-to-protect reporting was unanticipated. Such reporting does not occur at this time. Thus, no customers and no public interest organizations – be they formal regulatory commissions or agencies associated with public health and welfare – have a settled expectation regarding this kind of information or a reliance on receiving it. Staying the requirement for broad-based, unconditional DS3 simplex reporting, therefore, will do no harm to these third parties. Rather, the partial stay would essentially leave matters as they exist today until a more complete record is developed on the costs and benefits of proceeding with a more complex and costly reporting regime for simplex.<sup>19</sup>

Moreover, as has been argued by carriers, a customer's service is almost never impaired or impacted when a switch-to-protect situation develops. Oftimes the event itself is transparent to the customer. The redundancy the customer wanted as a part of its service purchase operates just as the customer wants it to do and, in fact, the way the network was designed to operate – the

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the movant.”). *And see Memorandum Opinion and Order, TCI Cablevision of Dallas, Inc.*, 15 FCC Rcd 7379 ¶ 2 (2000) (citing to *Washington Metro.*; other citations omitted). *And see also Skillern v. Procunier*, 469 U.S. 1182, 1184, 105 S. Ct. 945, 83 L. Ed.2d 956 (Brennan, J., Marshall, J (dissenting) (“... [w]hile ‘the movant need not always show a “probability” of success on the merits,’ he must ‘present a substantial case on the merits when a serious legal question is involved and show that the balance of the equities . . . weighs heavily in the favor of granting the stay[.]’” (citation omitted).).

<sup>19</sup> *See Washington Metro.*, 559 F.2d at 844; *District 50, United Mine Workers of America v. Int’l Union, United Mine Workers of Am.*, 412 F.2d 165, 168 (D.C. Cir. 1969) (“The usual role of . . . preliminary [relief] is to preserve the status quo pending the outcome of litigation[.]” (citation omitted).).



customer's traffic is switched to protect the transmission of the information and matters requiring review are usually resolved in a timely fashion resulting in no event of concern.

4. A Partial Stay Is In The Public Interest

At this point, the record contains evidence of substantial costs and burdens associated with simplex reporting and no countervailing evidence supports any public benefit in such reporting. A partial stay, for a limited period of time, to allow for the development of a full record and a final decision based on facts and data is certainly in the public interest. Such a decision avoids the burdens (both monetary and human) associated with the implementation of a regulatory mandate that has not been fully analyzed.

III. CONCLUSION

For all the above reasons, the Commission should grant a limited partial stay of its DS3 reporting rule so that carriers are not required to file DS3 simplex event reports during the pendency of the reconsideration process. Wireline carriers affected by the rule are likely to prevail on the merits and persuade the Commission to eliminate the requirement as it is currently framed during the reconsideration process. No party will be harmed by a limited partial stay, since no similar rule exists at this time and the partial stay will simply extend the *status quo*. Moreover, the grant of a limited stay will alleviate the burden not only on carriers but on the Commission as well, a burden that far exceeds that originally anticipated by the Commission. Finally, the public interest will be advanced by not burdening carriers with substantial costs that

are either not recoverable or that must be passed onto consumers in the form of higher prices for the costs of goods sold. A partial stay is warranted in the instance case under the law and the equities.

Respectfully submitted,

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December 13, 2004

## ATTACHMENT A

### DECLARATION OF DENNIS PAPPAS

1. **Introduction.** In this declaration I, Dennis Pappas, provide background and supporting information for the Qwest Corporation (local exchange carrier) and Qwest Communications Corporation (interexchange carrier) (collectively “Qwest”) Petition for Partial Stay filing regarding DS3 simplex outage reporting. The information I provide is based largely on my own personal knowledge garnered from direct day-to-day personal involvement with the issues and topics discussed. Some of the information in this declaration has been provided to me by individuals with personal knowledge and responsibility for the topics under discussion. I consider this information reliable and I have, in fact, relied on it in assessing the current outage reporting impacts and consequences.
2. **Professional Information.**
  - a. I am currently a Director in the Public Policy organization representing Network Operations. While this position is lodged in the Public Policy organization within Qwest, my particular group has subject matter expertise in Network Operations and Impacts. I have made this expertise available in the past through testimony in various state regulatory proceedings.
  - b. I have worked in the telecommunications industry for 26 years, mostly with Qwest and its predecessor companies U S WEST, Mountain Bell and AT&T. I have held numerous management positions all which have required expertise in network operations, including, for example, Network Staff Manager and Regional Service Manager. Subsequent to this assignment I was the General Manager for Qwest’s Wholesale and Diversified markets. In this role, my team had the responsibility for about 75 competitive local exchange carrier (“CLEC”) accounts and among many other things, provided readouts to the CLECs on service affecting outages – my team monitored the progression of many of the CLEC outages to ensure timely response for service outages. Prior to 1993, I worked as a Network Installation and Maintenance Technician (I&M Technician) and an Outside Plant Technician responsible for the placement, installation and repair of Qwest facilities. I have performed many of the tasks, such as trouble isolation and cable repair, which are required by our technicians today in order to ensure that a customer outage does not continue for an extended period of time.
  - c. Since December 2001, in my capacity as witness for the company, and as part of my current job responsibilities, I have direct day-to-day involvement with Qwest’s employees responsible for network planning and operations with regards to state and federal regulatory mandates. In line with my job responsibilities, I

have been heavily involved in discussions with those employees regarding the impact of the Federal Communications Commission's ("Commission") recent *Service Outage Order*.<sup>1</sup> I had previous experience with the outage process since I was the Qwest representative in NRIC VI, Focus Group II on voluntary reporting. The team I was involved with in the Focus Group was charged with developing a voluntary regiment that would allow additional insight into "major" network events. This team was also responsible for developing the final report and recommendations that stemmed from several months of continued work.

3. **Reporting Under Previous Rules.** In 2003, Qwest filed a total of 8 final outage reports pursuant to 47 C.F.R. § 63.100. To date, in 2004, Qwest has filed 9 such reports. Since 1998, we have seen these reports go from 36 outage reports to 8 last year.
4. **DS3 Simplex Reporting.** At this time, Qwest estimates that DS3 simplex reporting would result in at least 804<sup>2</sup> reportable events for Qwest Corporation ("QC") (its local exchange carrier) and 1,606 reportable events for Qwest Communications Corporation ("QCC") (its interexchange company).<sup>3</sup> The Commission should stay its DS3 simplex

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<sup>1</sup> *In the Matter of New Part 4 of the Commission's Rules Concerning Disruptions to Communications, Report and Order and Further Notice of Proposed Rule Making*, 19 FCC Rcd 16830 (2004).

<sup>2</sup> Because of certain limitations in the historical data from which this number was calculated, I believe the number of QC simplex reportable events is slightly higher than 804 but at this time I cannot provide an exact number.

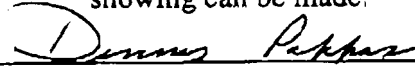
<sup>3</sup> On November 19, 2004, Qwest filed an *ex parte* with the Secretary of the Commission in which it described its then-existing estimates of the number of reportable events that would result to Qwest from the Commission's DS3 service outage reporting rules. In that *ex parte*, Qwest estimated that QC would have 1,400 reportable DS3 simplex events and QCC would have 1,600 reportable DS3 simplex events. The numbers used in that *ex parte* were derived by reviewing actual tickets to see if their duration would meet or exceed the threshold set forth in the proposed rules.

Qwest continues to review its data and to assess the requirements of the *Order* based on activity in relation to this docket. Subsequent to Qwest's *ex parte*, the United States Telecom Association ("USTA") filed a Petition for Stay regarding the DS3 simplex reporting obligations. In reviewing the attached Declarations to that Petition, it became clear to me and others at Qwest that there were multiple ways of counting "an outage." Qwest had utilized one way, *i.e.*, the counting of numerous services within a single sheath, while the USTA Declarants used a different counting mechanism. Specifically, USTA Declarants appear to have counted a cable cut as a single event not taking into consideration the services on the facility. Utilizing the USTA counting methodology, the number of additional reports for Qwest associated with DS3 simplex reporting (and for total DS3 reporting) has dropped somewhat but obviously remains substantial.

reporting obligation since it was imposed on the industry without adequate notice and without any meaningful cost/benefit analysis.

- a. A DS3 simplex switch-to-protect event is not an “outage” under the Commission’s own definition of the term because there is no degradation of service to the customer and no failure or degradation of the carrier’s network. In fact, the act of switching to protect occurs so quickly (50 milliseconds) that it is transparent to the end user. While Qwest’s network might record that this action occurred, its network systems are not designed to store this information in a manner that renders its retrieval simple or cheap (*e.g.*, in a “file”). Rather, the information is logged and stored; and either a person or a newly-developed system must be created to capture the detail necessary to determine if an outage report is necessary.
- b. There is no record evidence of the costs or benefits associated with DS3 simplex reporting. Rather, there is only anecdotal evidence submitted by the Commission itself without rigorous analysis.
- c. The over 2,000 reports for DS3 simplex reporting by Qwest alone represents 100% more reports than the Commission anticipated all carriers would be filing with respect to all of the new reporting obligations under the Service Outage Order. *See Service Outage Order*, Appendix D (Final Regulatory Flexibility Analysis), 19 FCC Rcd at 16946-47 ¶ 28.
- d. The new reporting requirements described above will result in additional costs associated with the manual operations. This is driven by the need to have constant monitoring of the event to determine if and when it meets the threshold set forth in the proposed rules. QC will also require additional headcount to conduct a root cause analysis and produce the documentation that will be submitted into the reporting tool while other headcount will be dedicated to nothing more than reviewing, approving and submitting the extensive number of reports.

- e. Not only does the new reporting obligation significantly increase costs and burdens on carriers but on the Commission as well since it will be receiving twice as many reports from just one carrier as it anticipated receiving for all reporting, but the public interest inherent in such a reporting regime has not been demonstrated. Simplex events in no manner reflect material defects in carriers' network infrastructures or substantive customer service impediments, the Commission's stated objectives in fashioning the requirement in the first instance. For these reasons, Qwest is asking for a stay of this requirement until such a showing can be made.



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December 13, 2004

## CERTIFICATE OF SERVICE

I, Richard Grozier, do hereby certify that I have caused the foregoing **QWEST CORPORATION AND QWEST COMMUNICATIONS CORPORATION PETITION FOR PARTIAL STAY** to be 1) filed with the FCC via its Electronic Comment Filing System, and 2) served, via e-mail on the FCC's duplicating contractor Best Copy and Printing, Inc. at [fcc@bcpweb.com](mailto:fcc@bcpweb.com).

Richard Grozier  
Richard Grozier

December 13, 2004